

Order from Chaos? Tribunal Reform in New Zealand

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In November 2006 the New Zealand Law Commission and the Ministry of Justice launched a joint programme of tribunal reform in New Zealand. The aim of the project was to “recommend a structure for existing tribunals as well as a framework for the establishment of tribunals in the future”. As I write this, the whisper from the Beehive suggests that the change in government means that the tribunal reform project is to be put on ice. This is a disappointing development but it should not surprise us. Although the tribunal system in New Zealand has been ripe for reform almost since the first tribunal was established, successive attempts to introduce coherence to the “system” have foundered in the difficult waters of the legislative process. From their humble (and relatively late) beginnings in 1908, New Zealand's system of tribunals now occupies a significant (perhaps even pre-eminent) position in New Zealand's system of justice, particularly in the field of Administrative Law. Despite this, tribunals remain a largely forgotten element of the wider legal system. Few student texts give much mention of them and they remain very much an academic and political backwater. It should be no surprise then that, given their astonishingly low profile in New Zealand, tribunals remain largely un-loved, unnoticed and un-reformed institutions. This paper from which it comes aims to at least partially fill the lacuna in New Zealand's legal literature by examining the current system in the light of the Law Commission's proposals.

Although this paper uses the Law Commission's proposals as its context, its underlying themes are more generic. It argues primarily that the reforms, although well intentioned actually reflect a fundamental misunderstanding of the place of tribunals in the legal system and significant confusion as to their role. This failure to put tribunals in their place is a phenomenon repeated (although to varying degrees) in most Common Law jurisdictions. The argument of this paper is that, rather than seeing tribunals as a discrete entity in need of reform, they should be regarded as an integral part of the legal system as a whole, with stronger links to other elements of the legal system which perform similar functions than to other tribunals. A second

and related point is that such reform needs to focus on the specific purposes of individual tribunals (or groups of tribunals) in their position as part of the system of specialised justice in New Zealand. This focus may lead us to the conclusion that a tribunal is not the most effective or efficient place to resolve these disputes. By taking this functional analysis of tribunals, it is argued that we will develop not only a much better understanding of the role of tribunals in the legal system but be able to construct a more effective system of dispute resolution, better able to deliver the functions currently performed by tribunals. This paper places these wider themes in the context of New Zealand's particular reform programme.

Tribunals and Specialist Justice in New Zealand

One of New Zealand's founding legal myths is the belief in the unity of its legal structure.¹ This quasi-Diceyan mantra states that ours is a system of generalist justice in the form of a single set of all-purpose courts. According to this view specialist forms of dispute resolution are an unwelcome exception, to be tolerated only in the most exceptional of circumstances and confined to an absolute minimum. In purely formal terms, of course, Dicey's dream remains intact and New Zealand's judiciary remains clearly unified, at least at the higher echelons. However, beneath this formal veneer of unity, the reality is very different. The practical reality for most users of the legal system, and particularly those who have a dispute with the state, is far from unified. For most, the judicial experience begins and ends with a specialist dispute resolution institution, often in the shape of a tribunal.²

As the Law Commission has recognised, tribunals are almost as old as the New Zealand legal system itself. The UK, like New Zealand, has long utilised specialised judicial forms, particularly in the administrative sphere, although it has also been somewhat in denial about their use. In effect they arrived along with gorse, rabbits and the British form of government. The reasons that had led the UK administration to develop specialist tribunals in the late-nineteenth century onwards also applied in New Zealand. What was good for the imperial goose was equally good for the colonial gander. Specifically, the growth in the state required mechanisms for making decisions when disputes arose over executive actions. Non-judicial, administrative tribunals were cheaper, more manageable and allowed citizens a right of appeal against the actions of the state that they normally would not have. These reasons were often contradictory, of course, leading to a large variety of tribunals being created for a variety of

1 And those of others following the Westminster model

2 Although the most common method of resolving an administrative dispute in New Zealand is probably internal review or the Ombudsman.

legitimate and, not so legitimate, reasons. It is this variety of drivers that has led to the variety of forms we see today.

To understand the current structure and its fundamental contradictions it is important to understand where it came from. Tribunals began as institutions of administrative law and like most of administrative law in New Zealand they were a pragmatic response to a political reality. The first New Zealand Tribunal³ in common with every tribunal since, was established as a specific response to a particular form of dispute. There was no intention that this institution would become a standard feature of dispute resolution in New Zealand. This institution was established to resolve disputes concerning Military Pensions without recourse to the judiciary, nothing else. The reasons why the ever expanding executive deserves an article in itself, but the perceived need to do so sowed the seeds of the tribunal system's weakness.⁴ Unlike the courts, tribunals could not be slotted into an overarching system and instead each was established as an individual stand alone institution.

The first tribunals in New Zealand were specialist institutions of administrative law charged with making decisions, or more commonly, reviewing decisions of the state.⁵ This “administrative” form of tribunal continues to exist and their growth in both size and importance means that today they almost deserve the epithet “system” themselves. They can be easily identified as a group of “Administrative Tribunals”, something that the Law Commission did in its early work on this project. The Law Commission's work identified 19 such tribunals in New Zealand in 2007, although this will be reduced to 16 during 2009.⁶

During the Twentieth Century these “public law” or “administrative” tribunals have been joined by an ever growing group of quasi-public tribunals. These are far less easy to classify and it is at this point that the whole notion of a “tribunal system” (or even a distinct institution recognisable as a tribunal) starts to get messy. By far the largest group of non-administrative tribunals were established to resolve disputes relating to the increasing number of professional bodies regulated by statute. A smaller number were established to resolve specific disputes which arose from statutory regulatory regimes. Finally, other specialist semi-judicial bodies, such as the Disputes Tribunal, were designed to resolve specific varieties of disputes amongst

³ The 1908 Military Pensions Tribunal

⁴ See for example, Tony Prosser's example of the UK's 1934 Unemployment Assistance Act tribunals being used as a way of deflecting policy complaints. T. Prosser, *Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and their Predecessors* (1977) 4 BJLS 59. Immigration tribunals have often been accused of playing the same role.

⁵ In common with most Common Law Tribunal systems

⁶ The distinctions used in the Law Commission's work are open to debate. One could put forward a robust argument to include the Mental Health Review Tribunal in this category.

the general population. Together, these four functional variants make up the system of tribunals in New Zealand.⁷

With each new tribunal, the system grew ever more complex and confusing. Duplication was common and many tribunals operated as orphans, lacking resources and cut off from the experience that could be gained from other tribunals. Yet, despite several attempts to mould these disparate institutions into a coherent system of administrative justice, the system remains largely unchanged since the development of the earliest tribunals. The reason why such attempts have failed can largely be attributed to the low priority that tribunals and administrative justice in general has been accorded in New Zealand. The current reform proposals are far from perfect, but they would at least have introduced a much needed degree of coherence into the current structure.⁸ For now, the tribunal 'system' in New Zealand remains a confusing minefield for applicants and decision makers alike.

The term, “system”, is highly misleading however and its use actually prejudices any analysis of the operation of New Zealand's system of specialist justice. In fact the development of tribunals has been anything but coherent and any attempt to corral them into a single system must by definition be “post-facto”. To define tribunals as a single system, capable of overall reform requires a formalist definition (and a rather broad one at that), rather than a functional one. Such a definition is open to significant interpretation and debate. The most obvious point to note is that even if one uses a formalist approach the difference between tribunals are dramatic. Some examples can more closely be associated with courts rather than other tribunals (The Disputes Tribunal, for example) while other specialist courts (such as the Environment Court) seem closer in substance to other tribunals rather than ordinary courts. Given the difficulty in defining tribunals, the bigger question here is whether we should really be splitting off these dispute resolution mechanisms into a distinct sub-set capable of being reformed in isolation.

When one looks closely at the institutions classified as tribunals by the New Zealand Law Commission, it is extremely difficult to find overall consistency, with a wide variety of procedures, functions and powers being utilised. Indeed, the only thing that they all clearly have in common is that they are non-judicial dispute resolution mechanisms.⁹ This leads us to pose a fundamental question. Are we actually looking at one “tribunal” system or many? This

⁷ Tribunals in New Zealand, Issues Paper 6, NZ Law Commission, 2008

⁸ I have made clear my views on this elsewhere. See WJ Hopkins, “Tribunal Reform in New Zealand: Could do Better?”, *NZ Lawyer*, 20th February 2009, pp16-18

⁹ Even this is questionable given the role of the judiciary in providing personnel for a large number of tribunals.

may seem like a rather academic question, but it is of fundamental importance to the future development of specialised justice in New Zealand. The New Zealand Law Commission's reforms were premised upon such an underlying unity. If it does not exist the proposed reform programme would lose much of its rationale.

Tribunal Reform in New Zealand

There can be little doubt that the current system of tribunals in New Zealand is in need of reform. Despite several attempts to mould these disparate institutions into a coherent structure the “system” remains largely unchanged since the development of the earliest tribunals. As mentioned above, the “system” is nothing more than a way convenient way of referring to the ad hoc collection of specialised tribunals and quasi-judicial bodies which have emerged outside the formal judicial structure over the past hundred years. Many of these bodies have little in common, something that the New Zealand Law Commission recognised as it struggled to define its remit.¹⁰ The problems that have emerged with the growth of these specialist non-judicial entities have not gone unnoticed but despite a regular flow of reports and proposals over the past fifty years, the tribunal “structure” in New Zealand remains the unruly cousin in the New Zealand legal family. Not for New Zealand, the single Appeals Tribunal favoured by the Australian Federal level nor even the minimal legislative framework provided by the UK's Tribunals and Inquiries Act.¹¹ Ironically, in a country addicted to legislation, New Zealand's tribunals have been left largely unreformed.

The reasons for this are relatively simple. Tribunals are a forgotten part of a Cinderella subject. Academics, with their bad dose of “appeal courtitis” did not waste their time on such trivial matters (with a few notable exceptions) while politicians have little appetite for such administrative reforms. Tribunals are an unfashionable quasi-legal backwater and not vote winning headline grabbers. For these reasons, the only meaningful reforms over the past half century were a failed (and all but forgotten attempt at an Administrative Appeal Court), the creation of guidelines to introduce some coherence in their procedures and the establishment of a tribunals unit within the Ministry of Justice.¹² Outside these minimal, and at times ineffective, attempts at coherence, the structure has remained largely ad hoc.

10 New Zealand Law Commission, *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008)

11 And now the Tribunals, Courts and Enforcement Act 2007

12 The Tribunals Unit of the Ministry of Justice, established in 2002

The problem with this state of affairs is that although tribunals may not figure heavily in the minds of our leaders and thinkers, they matter disproportionately to individuals faced with the need to resolve a perceived injustice, particularly against the state. When find your ACC claim is rejected or your visa is revoked, the tribunal “system” becomes very important indeed. In a wide range of subject areas, the tribunals are the “court of first instance” for the citizen. In most cases it will also be the final decision maker, particularly against the state. Only the rich, the desperate and the insane go to judicial review. Tribunals therefore matter to the individual. It is for this reason that the current reform project is to be heartily welcomed.

The Law Commission Proposals

The Law Commission/Ministry of Justice proposals are at the same time both broad and conservative in nature. They are broad in their (largely unsuccessful) attempt to unify the entire tribunal “system”, as defined by the Law Commission. They are also conservative, in that such reform is largely structural and concerned with creating a neat administrative system in which all tribunals can be placed. This proposed package of reforms would certainly make the system more coherent but it is less than clear that it will address the more fundamental issues that face the tribunal “system” as a whole.

The reform package focuses on the structural organisation of the tribunal scheme. The key proposal is the establishment of a single legislative framework to encompass all tribunals (as defined by the Law Commission). The legislative framework would see a standardisation of procedures and powers (including powers to summon witnesses or evidence, administer oaths and require disclosure) as well as the introduction of an automatic right of appeal (limited in many instances). There is no doubt that these reforms would introduce a degree of coherence to the current, confusing, structure. There are also certain elements which are difficult to argue with. The introduction of a more transparent and independent appointment process, for example, will undoubtedly improve the perceived independence of some tribunals who are currently seen as too close to key stakeholders (usually the state).

Alongside the single legislative framework, the reforms propose the creation of a “unified” tribunal sector.¹³ This would see the creation of three branches within the single unified structure. The Administrative Review Division as the name suggests would comprise those tribunals which review the decisions of the executive, while the Inter Partes Dispute Division

¹³ The current stalled nature of the process means that these have not been formally accepted by the Ministry of Justice

would comprise a very small group of tribunals which the Law Commission perceives as primarily concerned with disputes between individuals. These divisions would be headed by an individual charged with overall oversight of procedures, training and administration. Alongside the divisions an Occupational and Industry Regulations Group would comprise a looser collection of tribunals headed by a chair with a less involved role than their divisional counterpart. The unified structure would not have a single Appeal Tribunal, a decision that is probably correct given the role of tribunals as providers of specialist justice.

In fact when we examine the structure proposed, the perception of unity is somewhat spoilt by the realities. What is actually proposed is a “nesting” approach with a variety of sub-sets within the single framework. Not all tribunals will be part of the framework or even part of one of the proposed groups/divisions. This is superficial unity at best and it begs several questions, not least of which is why persevere with such a convoluted structure in the name of un-achievable unity? Will such limited “unity” really add anything to the system?

There is no clearer example of the dangers of such enforced unity, than the example of the Administrative Tribunals. These institutions have tended to be seen as a part of a wider system of tribunals rather than as part of administrative law.¹⁴ However, the functions of administrative tribunals are very different from these other varieties of Alternative Dispute Resolution and it is far from clear that they should be seen as parts of the same as tribunals dealing with the resolution of “leaky homes” disputes, for example.¹⁵ Administrative tribunals are the *de facto* courts of first instance in New Zealand administrative law.¹⁶ As such, they need to be considered in tandem with other elements of the administrative legal order, rather than other tribunals. When we take this approach other more fundamental questions start to emerge, most notably, are the administrative tribunals the best place for these disputes to be heard?

The second assumption which underpins the unified approach is the belief that increased standardisation of procedures through a legislative framework is a self-evident “good thing”. This may be true, but the idea that tribunals should follow procedures rooted in the adversarial procedures of the courts, as this reform proposes, pre-supposes an adversarial tribunal.

The use of technical, quasi-judicial, procedural rules, brings with it a need for greater legal

14 See for example, Law Commission papers. The reasons for this approach are never fully articulated in any research on the subject and seems based upon an assumption that all tribunals are comparable. It is the submission of this author that this is an incorrect assumption.

15 There is not time to explore the ADR revolution here, relevant as it is to this paper. It should be noted, however, that the term “Alternative” is highly misleading. In fact these DR mechanisms are the norm.

16 They can even be regarded as the appeal courts in some instances, with officials and/or internal tribunals making the first decisions or hearing the first instance complaint.

expertise and thus the use of lawyers. Is this really what we want? Do we really want the imposition of court based principles of natural justice in the tribunal arena? Natural Justice, as understood in New Zealand exists to ensure equality of arms between the combatants in an adversarial trial environment. However, the use of “natural justice” in a tribunal context presupposes such an adversarial approach is appropriate across the entire tribunal system. It is not clear that this approach is always desirable and it may have the effect of making tribunals cheap courts, rather than effective dispute resolution mechanisms in their own right.

A related issue is the assumption that increasing the involvement of the judiciary in the tribunal structure will improve things. Again, this may be true but the issue has not been properly considered in the Law Commission's proposals. Judges are expensive beasts and tend to come with judicial baggage. They are used to the realities of the courtroom and there is always the danger that their involvement will bring a greater judicialisation of the tribunal process. The greater use of lawyers across the tribunal system, which appears to flow from the Law Commission's approach, creates the danger of increased formality and thus increased costs in these non-judicial dispute resolution mechanisms.

The Law Commission, in its report, deals with the issue costs and particularly the cost of legal advice in relation to a number of tribunals. The response is to increase the Legal Aid entitlement for complainants. However, this seems to again pre-suppose a judicial approach to tribunals. If we need a lawyer to take a complaint, the default position should not be to get the state to pay the lawyer. Instead, we need to be asking the question why do we need lawyer in a non-judicial dispute resolution environment?

The Future of New Zealand Tribunals

Overall, these criticisms can be traced back to the structural approach of the proposals and the failure to address the underlying functions of the tribunals. To some extent this may reflect the remit given to the Commission and the limits that the Ministry of Justice imposed upon the reform programme. There is much talk in the Law Commission's Issues paper of the needs of individuals but the final results are extremely disappointing.¹⁷ There is talk of a single “shop front” approach to those individuals seeking redress. This is to be commended and should be a key feature of the proposals. It is never elaborated upon. In a time of economic hardship a reform like this is a prime opportunity to reduce transaction costs in administrative justice. The reasons for this lack of user focus are to be found not in the final report but in the structural

¹⁷ Issues paper

approach taken throughout the reform process.

Despite the comments above, the purpose of this paper is not to criticise the work of the Law Commission in its efforts to reform the tribunal sector in New Zealand. The project was and is a long overdue attempt to introduce some much needed rationality into the New Zealand tribunal structure. The Law Commission should be commended for its role in trying achieving this. However, in taking the approach they have the proposals run the risk of failing to address the fundamental questions surrounding the role and function of tribunals in the wider legal system. By assuming that the tribunal sector can be reformed as a whole, the proposals do not sufficiently address the impact of tribunals upon the lives of individuals. Tribunals need to be seen not as a system of cheap courts, but as a part of the wider system of dispute resolution in New Zealand. These reforms have the potential to unintentionally do more of the former and reduce the very elements of the tribunal system which make it so attractive in a modern system of dispute resolution.